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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/800,535	03/15/2004	Sujal M. Patel	RN 25C1 (2635-024-05)	1306

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BELLEVUE, WA 98004

EXAMINER
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NGO, NGUYEN HOANG

ART UNIT	PAPER NUMBER
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2473

MAIL DATE	DELIVERY MODE
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09/14/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/800,535	<b>Applicant(s)</b> PATEL ET AL.	
	<b>Examiner</b> NGUYEN NGO	<b>Art Unit</b> 2473	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 23 June 2010.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-13, 16-24, 53, 55-62, 64 and 65 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 6-9, 11, 16-22, 24 and 57-59 is/are rejected.
- 7) ☒ Claim(s) 5, 10, 12-14, 23, 53-56 and 60-66 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

***Response to Amendment***

This communication is in response to the amendment of 6/23/2010. Accordingly, Claims 1-13, 16-24, 53, 55-62, 64, 65, are currently pending in the application.

***Claim Rejections - 35 USC § 101***

1. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

2. Claim 20-24, 64, 65, 66, are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

The language of the claim raises a question as to whether the claim is directed merely to an abstract idea that is not tied to a technological art, environment or machine which would result in a practical application producing a concrete, useful, and tangible result to form the basis of statutory subject matter under 35 U.S.C. 101.

**Claim 20**, a claim drawn to such a computer readable medium that covers both transitory and non-transitory embodiments, thus, "medium" also cover "transitory medium" which is not statutory subject matter. The claim should be amended to cover only statutory embodiments to avoid a rejection under 35 U.S.C. 101 by adding the limitation "non-transitory medium" to the claim.

Examiner suggests using such phrases as "A non-transitory computer readable medium embedded with a computer executable program including instructions for".

Furthermore, the USPTO is obliged to give claims their broadest reasonable interpretation. The broadest reasonable interpretation of a claim drawn too a computer

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readable medium (also called machine readable medium and other such variations) typically covers forms of non-transitory tangible media and transitory propagating signals per se in view of the ordinary and customary meaning of computer readable media. When the broadest reasonable interpretation of a claim covers a signal per se, the claim must be rejected under 35 U.S.C. 101 as covering non-statutory subject matter.

### ***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims 1, 2, 3, 4, 6, 7, 8, 9, 11, 16, 17, 18, 19, 20, 21, 22, 24, 57, 58, 59, are rejected under 35 U.S.C. 103(a) as being unpatentable over Reynolds (US 6791943), in view of Yamato et al. (US 6094431).

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Regarding claim 1, 6, 7, 16, 20, 59, Reynolds discloses a method of determining network conditions (a method and associated apparatus and program for determining the bandwidth, abstract and col3 lines 55-62 and col8 lines 5-30 and col9 lines 20-30), the method comprising:

- determining a first time associated with receipt of a first event (sensing the occurrence of a first predetermined event, col5 lines 49-54 and col8 lines 30-47 and col10 lines 3-11);

- determining a second time associated with receipt of a second event which is immediately after the first event, sensing the occurrence of a second predetermined event, col5 lines 49-54 and col8 lines 30-47 and col10 lines 3-11);

- determining a size of data between the occurrences of the first and second event (counting the number of cells received from the network connection between the time period, col5 lines 52-61 and col13 lines 15-30); and

- calculating a transmission bandwidth by dividing the size by a function of a difference between the first and second times (col13 lines 15-30).

Reynolds however fails to specifically disclose the first time being associated with receipt of a first data packet and second time associated with receipt of a second data packet. Reynolds however discloses of determining times related to a first and second predetermined events that may be the occurrence of any conditions such as successive occurrences of RM cells (col8 lines 30-47). It is well known in the art that in ATM systems, packets or PDUs or segmented into cells and that a RM cell may indicate that

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the sell is a last ATM cell of a PDU/packet. Yamato discloses of such a concept as Yamato discloses that an ATM block be enclosed by adjacent RM cells (RM cell indicating receipt of a first data packet or second data packet, col7 lines 6-23 and figure 5) in which an ATM block may correlate to a packet/PDU. Thus it should be apparent that a receipt of a RM cell may indicate a receipt of a data packet as the data packet may correlate to a PDU or ATM block. Thus it should be obvious to a person skilled in the art to incorporate the concept of having RM cells indicate a receipt of an ATM block (a packet) as disclosed by Yamato into the method of determining the bandwidth of a cell stream as disclosed by Reynolds, in order to efficiently and correctly determine a time interval for a specific packet segmented into cells so that bandwidth may be determined for such a stream.

Regarding claim 2, 11, 24, 57, 58, Reynolds fails to specifically disclose reading a header in the first data packet, wherein the header includes data indicating the second data packet will be transmitted immediately after transmission of the first data packet to make the first and second data packets back-to-back data packets. Reynolds however discloses of examining the contents of the ATM cell header to classify cells (col11 lines 30-40) and of RM cells to provide control information (col7 lines 30-38). It should thus be apparent that the RM cells include information for distinguishing cells and PDUs correlating to indicating a second data packet will be transmitted.

Regarding claim 3, 8, 17, 21, Reynolds discloses additionally comprising reporting to a server computer the transmission bandwidth (col8 lines 15-25).

Regarding claim 4, 9, 18, 22, Reynolds discloses wherein the data packets are two of a plurality of data packets that collectively comprise a portion of a media presentation rendered to a user (col1 lines 39-42).

Regarding claim 19, the combination of Reynolds and Yamato fails to specifically disclose a modem for receiving the data packets. Reynolds however discloses of a cell bus interface device that may be embodied in hardware, software, or firmware (col5 lines 29-40). It is well known in the art that modems incorporate such hardware for receiving data packets/cells. It would have thus been obvious to a person skilled in the art to have a cell bus interface device be a modem in order to receive the data packets using the correct hardware.

#### ***Allowable Subject Matter***

4. Claims 5, 10, 12, 13, 14, 23, 53, 54, 55, 56, 60, 61, 62, 63, 64, 65, 66, are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response to Arguments***

5. Applicant's arguments with respect to claims 1-13, 16-24, 53, 55-62, 64, 65, have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

7. Martin et al. (US 6021129)

8. McKee et al. (US 5477531)

9. Luijten et al. (US 7103050)

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NGUYEN NGO whose telephone number is (571)272-8398. The examiner can normally be reached on Monday-Friday 7am - 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kwang Yao can be reached on (571)272-3182. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Aung S. Moe/  
Supervisory Patent Examiner, Art Unit 2474

/N. N./  
Examiner, Art Unit 2473

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